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August 17, 2001

**VIA MESSENGER**

Lois G. Lerner, Esq.  
Acting General Counsel  
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999 E Street, N.W.  
Washington, DC 20463

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

**Re: MURs 4935 and 5057**

Dear Ms. Lerner:

Pursuant to 11 C.F.R. § 111.15(a), enclosed please find the original and two copies of Respondents' Motion to Quash in the above-captioned MURs.

Very truly yours,



Brian G. Svoboda  
Counsel to Respondents

Enclosures

[29614-0001/DA012290 031]

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

DEAR FOR CONGRESS and ABRAHAM  
ROTH, as Treasurer,

Respondents.

MURs 4935 and 5057

**MOTION TO QUASH**

Pursuant to 11 C.F.R. § 111.15, Respondents Dear for Congress and Abraham Roth, as Treasurer (collectively, "the Committee") move the Commission to quash its August 10, 2001, Subpoena to Produce Documents and Order to Submit Written Answers.

This subpoena is part of an unusually aggressive and intrusive Commission investigation involving direct contact between the government and the Committee's political supporters. Consequently, it raises serious First Amendment concerns that the Commission does not and cannot overcome with a showing of compelling need. Not only is the subpoena overbroad and chilling in its immediate effect. It shows every sign of being intended to fuel yet another round of direct government contacts with Committee supporters.

Moreover, the subpoena seeks much of the same information that the committee that has already been forced to produce in the audit process. As such, the subpoena is overbroad and unduly burdensome, and should be quashed.

## I. BACKGROUND

The genesis of this investigation lies principally in a Commission audit of the Committee's 1997 and 1998 activities. During that audit, the Committee was compelled to provide the Commission with access to "all records relevant" to the reports it filed with respect to the covered period. See 11 C F R § 104.14(b) (2001).

Indeed, as the Commission has acknowledged, the Committee gave the auditors access to records of contacts with contributors seeking identifying information, copies of vendor invoices; and signed statements from 32 contributors attesting to the legality of their contributions. Federal Election Commission, Report of the Audit Division on Dear for Congress, Inc., at 2-3 (Jan. 13, 2000) (hereinafter "Final Audit Report")

When the Committee did not provide requested information, the Final Audit Report consistently described it as the product of poor Committee recordkeeping. For example, the report cited the agreement of the Committee's treasurer that "the maintenance of contributor records ... was deficient." Id. at 13. Similarly, the report stated that "it is apparent that the Committee did not maintain any signed reattribution letters ..." Id. at 10. In the end, the Final Audit Report alleged that the Committee failed to maintain adequate financial records See id. at 1-2. At no point did the Report claim that the Committee withheld any existing documents.

Nonetheless, on August 10, 2001, the Commission issued a subpoena for much of the same information it required the Committee to produce for the audit. The subpoena compelled the production of "letters that the Committee sent to contributors to confirm their contributions ... letters sent to the Committee from contributors confirming that their contributions were made with personal funds . . . and documents concerning the Committee's business relationship with any consulting firms ..." (Subpoena at 3-4.)

The subpoena also ordered the Committee to respond to a series of interrogatory requests. Some of the questions sought information that was the subject of review during the

audit, such as the manner in which contributions were handled and the identity of the Committee's consultants. (See id. at 4 ) However, one question asked the Committee to provide the "most recent business and residence addresses and telephone numbers" of the volunteers who hosted fundraising events on its behalf, as well as of certain named political supporters. (Id. at 3, 5 ) The subpoena came after the Commission had apparently contacted several Committee supporters and asked some of them, inter alia, why they supported Noach Dear.

## **II. ARGUMENT**

### **A. The First Amendment to the United States Constitution Prohibits the Commission From Enforcing the Subpoena as Now Written**

The evaluation of any Commission subpoena must begin by recognizing that "the activities that the FEC seeks to investigate differ profoundly in terms of constitutional significance from the activities that are generally the subject of investigation by other federal administrative agencies." FEC v Florida For Kennedy Comm., 681 F.2d 1281, 1284 (11th Cir. 1982) The information gathered in a Commission investigation "is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations." FEC v Machinists Non-Partisan Political League, 655 F 2d 380, 388 (D C Cir. 1981), cert. denied, 454 U.S. 897 (1981) Commission investigations necessarily involve the "real potential for chilling the free exercise of political speech and association guarded by the first amendment " Id.

Consequently, when the Commission seeks information about protected First Amendment activity, "the usual deference to the administration agency is not appropriate " FEC v. LaRouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987) Instead, "a more exacting scrutiny of the justification offered by the agency" is required Id. The FEC "is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation." Id. Rather, when disclosure would "compromise the privacy of individual

political associations," the Commission "must make some showing of need for the material sought beyond its mere relevance to a proper investigation." Id. at 234-35. See also NAACP v Alabama, 357 U S 449, 462-63 (1958) (requiring a compelling reason for access to information about an advocacy group's supporters when there is a likelihood of substantial restraint on association).

The subpoena fails this high burden for two reasons:

First, the Commission seeks personal and political information about an entire class of Committee supporters, without indicating any need – let alone a compelling one – for the full extent of the information sought. The subpoena requires the Committee to divulge the names, addresses, employment information and telephone numbers of every individual who "coordinated" an event for it where funds were raised. It compels this information even when the fundraising was only an incidental part of the event. For example, the Committee would be required to divulge the home and work telephone numbers of a person who organized a political rally on its behalf, even if that rally was not intended to raise funds, and yielded only one small, spontaneous donation to the campaign.

The potential "deterrent effect" on the political activities of these individuals is evident. Under Commission rules, one may generally raise funds for a political committee without any fear that his or her association with the committee will be disclosed. See 11 C.F.R. § 110.6(b)(2)(i)(E). By supporting Noach Dear, these individuals opposed a candidate who now sits in Congress. See Michael Barone, The Almanac of American Politics 2002, at 1068-69 (2001). They also stood opposite the current senior United States Senator from New York, who endorsed the winning candidate over Mr. Dear. See id. They can hardly be pleased that their association with Mr. Dear will now be thrust into public view, particularly in light of the Commission's stated policy of placing its investigative materials on the public record at the conclusion of a MUR.

The chilling effect of this subpoena is underscored by the Commission's previous direct contacts with individual Committee supporters. The Committee has learned that Commission representatives have contacted several individuals and asked, inter alia, why they supported Mr. Dear. The clear implication of the subpoena – which compels the production of home and business addresses and telephone numbers for six identified individuals and an entire class of others – is that others will be contacted in the future. The chilling effect of such investigative techniques cannot be underestimated, deployed as they are in one of the most dense and ethnic urban neighborhoods in the United States, where contact with a federal investigative agency is intimidating under the most benign circumstances.

This subpoena directly recalls the one that the United States Court of Appeals for the Second Circuit rejected in LaRouche. There, too, the Commission sought to compel the names of individuals who solicited contributions on the respondent's behalf, without making any showing of a compelling need. See 817 F.2d at 234-35. It also recalls the subpoena rejected in Machinists, which demanded "a listing of every official, employee, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any [of the respondent's] ... activities." Id. Finally, it recalls the one quashed in NAACP v. Alabama, where an advocacy organization was willing to settle, but the state chose nonetheless to compel production of its membership list. See 357 U.S. at 453. Here, Respondents have consistently sought pre-probable cause conciliation of these matters, only to be rebuffed by the Commission at every turn.

All of these cases suggest the proper outcome here. Because the subpoena is overbroad, has a chilling effect on political association, and lacks any compelling purpose to override the restraint on association, it should be quashed. See id. at 466; LaRouche, 817 F.2d at 235.

Second, the Commission can hardly present a compelling need for a production of the information sought by the subpoena, when it has forced the Committee to provide access to much of it already through the audit process.

The subpoena seeks three categories of documents that overlap with those reviewed in the Commission's audit of the Committee. (1) "letters that the Committee sent to contributors to confirm their contributions"; (2) "letters sent to the Committee from contributors confirming that their contributions were made with personal funds"; and (3) documents concerning the Committee's business relationship with any consulting firms, including . invoices." (Subpoena at 3-4.) It also seeks testimony that falls plainly within the scope of the audit, such as the manner in which contributions were handled and the identity of Committee vendors (See id.)

The Committee has already provided much of this information to the Commission. As the Final Audit Report acknowledges, "the Committee provided signed statements from 32 contributors attesting that the contribution was made from their personal funds " Final Audit Report at 13. Similarly, the Final Audit Report states that "the Committee provided copies of invoices that materially documented" 17 disbursements, while indicating that "supporting documentation was available" for the remainder. Id. at 2.

If the Commission seeks specific information that it believes the audit process did not cover – an unlikely event, given the breadth of the Commission's recordkeeping requirements, see 11 C.F.R. § 104 14(b), and the absence of any suggestion that the Committee withheld existing documents from the auditors – then it should say so, and narrow the subpoena. Yet to force the Committee to produce the same information repeatedly is "mere official curiosity," which "will not suffice as the basis for FEC investigations." Machinists, 655 F.2d at 388. It also constitutes a very real burden on the Committee, which would be forced to identify, review and produce documents the Commission has already seen.

### III. CONCLUSION

For the foregoing reasons, Respondent's motion to quash the Commission's subpoena should be granted.

Respectfully Submitted,



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